No. 86-217

Supreme Court, U.S.
FILED
SEP 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

IN RE THE MATTER OF
PATTON L. SMITH, LAURENCE J. BERRY, JACK R. CHANDLER, JOSEPH A. SIGFRID, DON F. ELLER, DAN E. SUTHER, RICHARD ROMINGER AND HANS VAN NES,
Petitioners.

Ninth Cir. No. 85-2313
D.C. No. CVF 84 55 EDP
(E.D. Cal.)

OPPOSITION OF REAL PARTIES IN INTEREST TO PETITION OF WRIT OF MANDAMUS

KEKER & BROCKETT
JOHN W. KEKER
DAVID J. MEADOWS
Counsel of Record
807 Montgomery Street
San Francisco, CA 94133
(415) 391-5400

KONG, YUN & SAKUMA
CLEMENT J. KONG
2430 "J" Street
Sacramento, CA 95816
(916) 441-6255

Attorneys for Real Parties in Interest George and Hendrika Neary, individually, and George Neary as representative for Neary & Neary Partnership and Neary & Neary Partnership aka Neary Enterprises and Neary Ranches, a Partnership

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

TABLE OF CONTENTS

Page

A. Petitioners must stand trial regardless of the result of their appeal; therefore *Mitchell v. Forsyth* is inapplicable and petitioners will suffer no detriment from denial of the writ 2

B. Petitioners have failed to state accurately facts necessary for this court's "ready and adequate understanding of the points requiring consideration" 4

C. Petitioners' "legal issues" are not appealable under *Mitchell v. Forsyth*—the decision below was not "clearly erroneous" 4

1. Petitioners do not dispute that their conduct violated clearly established provisions of FIFRA 5

2. Petitioners failed to raise in the District Court their arguments for qualified immunity to the constitutional claims 6

3. The District Court's denial of summary judgment on the procedural due process claims was based on disputed material facts—the applicable law was clearly established 6

4. Petitioners attempt to fabricate a "legal issue" on the substantive due process claims—they do not argue that the District Court did not apply clearly established law 7

5. Petitioners mischaracterize the appealable legal issue on fourth amendment claims 8

D. Issuance of a Writ of Mandamus is not justified, and there is no reason for the Supreme Court to assume jurisdiction 9

Conclusion 10

TABLE OF CASES AND AUTHORITIES

Page

Berlanti v. Bodman, 780 F.2d 296 (3d Cir. 1985) 7

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 3

Davis v. Scherer, ____ U.S. ____, 104 S.Ct. 3012 (1984) 5

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 5, 7, 8, 9

Haygood v. Younger, 769 F.2d 1350 (9th Cir. 1985) (en banc), *cert. pet. pending sub nom.* Crake v. Haygood, 54 U.S.L.W. 3393 (Dec. 10, 1985) 7

Maine v. Thiboutot, 448 U.S. 1 (1980) 5

Mann v. City of Tucson, 782 F.2d 790 (9th Cir. 1986) ... 8

Mitchell v. Forsyth, ____ U.S. ____, 105 S.Ct. 2806 (1985) 2, 3, 5, 9

Parratt v. Taylor, 451 U.S. 527 (1981) 6, 7, 8

Rutherford v. City of Berkeley, 780 F.2d 1444 (9th Cir. 1986) 8

Other Authorities

Local Rule 281(b)(13), Eastern District of California 2

12 U.S.C. § 136j(a)(2)(G) 5

28 U.S.C. § 1291 3

42 U.S.C. § 1983 5

Federal Insecticide, Fungicide and Rodenticide Act 4, 5

No. 86-217

In the Supreme Court

OF THE

United States

IN RE THE MATTER OF
PATTON L. SMITH, LAURENCE J. BERRY,
JACK R. CHANDLER, JOSEPH A. SIGFRID,
DON F. ELLER, DAN E. SUTHER,
RICHARD ROMINGER AND HANS VAN NES,
Petitioners.

Ninth Cir. No. 85-2313
D.C. No. CVF 84 55 EDP
(E.D. Cal.)

OPPOSITION OF REAL PARTIES IN INTEREST TO PETITION OF WRIT OF MANDAMUS

The Petition for Writ of Mandamus should be summarily denied. Petitioners have failed to state accurately the issue presented to the Court of Appeals and to present the actual materials to the Supreme Court that are necessary for the Court's decision on whether to grant a hearing on this issue. The record demonstrates that there is no detriment to Petitioners that a grant of mandamus would avoid, that the ruling of the Ninth Circuit was not clearly erroneous, and that Petitioners argue to this court issues never raised before the trial court. Moreover, there is no showing that the case involves an oft-repeated error or an important issue justifying intervention by this Court. As Petitioners acknowledged, in these circumstances issuance of the writ is not justified.

A. Petitioners Must Stand Trial Regardless of the Result of Their Appeal; Therefore *Mitchell v. Forsyth* Is Inapplicable and Petitioners Will Suffer No Detriment from Denial of the Writ

Real Parties in Interest, George and Hendrika Neary, individually, George Neary as representative for Neary & Neary Partnership, and Neary & Neary Partnership, aka Neary Enterprises and Neary Ranches, a Partnership, have now waited years to have a case ready for trial go to trial while the Defendants use an array of procedural devices to delay trial. Ironically, nothing Petitioners do, including this Petition for Writ of Mandamus, will prevent any of them from going to trial. This *fact,* although wholly ignored in the Petition, was presented to the Court of Appeals. The reason is simply that, even in the event that the Writ were granted and Petitioners were successful on their appeal (an event, as discussed below, the likelihood of which is subatomic), each and every one of them would face trial on state law issues concerning the very conduct which forms the basis of the civil rights actions.[1]

---

[1] Petitioners argued to the Court of Appeals that they are immune under various immunity provisions of the California Tort Claims Act, and therefore can avoid trial. Petitioners failed to inform the Court of Appeals that they had filed two major motions for summary judgment where they raised none of the immunity defenses they suggest apply. On March 9, 1984, the District Court ordered that "all further dispositive pre-trial motions . . . will be heard on Monday, July 30, 1984 . . . ," but again, Petitioners failed to raise any of these state law immunity claims. In September, 1984, the Petitioners filed a pretrial statement discussing the immunity defenses but without mentioning an intent to file a pretrial motion on the issue, as required by Local Rule 281(b)(13) of the Eastern District of California. And on July 11, 1985, the District Court judge was prepared to set a trial, at which time Petitioners announced they intended to file the notice of appeal that began the instant proceedings but said nothing about intending to file motions to dismiss or for summary judgment on the state immunity grounds. All these events occurred in the trial court approximately six years after the complaint was filed, and in that entire period Petitioners never once raised these immunity defenses for resolution by the court. To suggest that they should now have the opportunity to do so reveals the basic motivation of the defense of this action: delay.

In *Mitchell v. Forsyth*, ____ U.S. ____, 105 S.Ct. 2806 (1985), the only causes of action brought against the appealing defendants were civil rights claims that could be resolved by a successful assertion of the defense of qualified immunity. 105 S.Ct. at 2810. In such a case, where a favorable ruling will vindicate a Defendant's right not to stand trial, the standards of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), are met and immediate appealability is appropriate. 105 S.Ct. at 2815-16. This Court reasoned that the right of the qualifiedly immune to avoid trial was a "clai[m] of right separable from, and collateral to, rights asserted in the action" under *Cohen*. Unless appeal was permitted that qualified right would be lost. *Id.* at 2816.

But if as here the defendant will not avoid trial, then the criteria in *Cohen* are not satisfied and the basis for creating the *Mitchell v. Forsyth* exception is absent. The claim of the qualified right not to stand trial is not separable from or collateral to an action in which trial on other claims is inevitable, and the "right" itself is illusory in these circumstances. Indeed, where a state has specifically set forth the circumstances in which its employees can be made defendants and will face trial for their conduct, the fundamental premise of *Mitchell*, the official's immunity from suit, *id.*, has been dislocated by the state's determination to permit trial concerning such conduct. No policy is served by permitting interlocutory appeals in these circumstances, while the noncompensible cost to Plaintiffs of permitting such appeals will often be substantial, and in this case has been enormous.

Accordingly, in this case the District Court's denial of a claim of qualified immunity is not an appealable final decision within the meaning of 28 U.S.C. § 1291; *Mitchell v. Forsyth* does not apply. Moreover, for the same reasons, there has been no showing that the issuance of a Writ of Mandamus would avoid any detriment, because the detriment claimed is "subjecting petitioners to trial without first obtaining appellate review of the denial of 'qualified immunity' ". Petition ¶ 13.

B. Petitioners Have Failed to State Accurately Facts Necessary for This Court's "Ready and Adequate Understanding of the Points Requiring Consideration"

The Petition should also be denied because petitioners have misled the Court as to the issues presented below. Petitioners do not mention that their trial is inevitable, and therefore simply ignore part of the record presented to the Court of Appeal in an attempt to color this Court's perception of the Ninth Circuit Court of Appeals' decision. The petition also misrepresents the basis of the Court of Appeals' decision.[2] This is contrary to the rules of this Court, in particular Rule 21.5. As discussed further below, the petition also fails to present the full story in many other particulars in connection with the substantive issues raised.

C. Petitioners' "Legal Issues" Are Not Appealable Under *Mitchell v. Forsyth*—the Decision Below Was Not "Clearly Erroneous"

Plaintiffs' federal claims against Petitioners allege violations of substantive and procedural due process under the Fourteenth Amendment arising out of the Petitioners' decisions to issue a "hold order" (in effect, a quarantine) on Plaintiffs' cattle, to maintain that hold order for seven months beyond all need, and to require treatment of Plaintiffs' cattle with a dangerous chemical in order to treat a condition that the cattle did not have. Plaintiffs also assert violations of substantive due process and of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") in the manner that Petitioners conducted the treatment of Plaintiffs' cattle with that chemical. Each of these acts is also the basis of state law claims which are not here at issue, except as noted above.

---

[2] Petitioners state that "the motions panel of the Circuit Court has ruled, without ever having the issue briefed and argued, that Petitioners' appeal does not turn on an issue of law." Petition ¶ 15. In fact, the arguments raised in the Petition and the responses of Plaintiffs in this Opposition were presented to the Court of Appeal on the Motion for Rehearing, and after consideration of those pleadings the Motion for Rehearing was denied by a three-judge panel.

Petitioners attempt to characterize four issues as appealable under *Mitchell v. Forsyth*. In each case, Petitioners distort the issue under *Mitchell v. Forsyth* and other applicable law.

1. Petitioners Do Not Dispute That Their Conduct Violated Clearly Established Provisions of FIFRA

Petitioners claim that the appealable issue concerning their violations of FIFRA is whether it was clearly established at the time of the violations that 42 U.S.C. § 1983 provided a remedy for federal statutory violations. There is no question that Petitioners' conduct—for example, the application of a registered pesticide in a manner contrary to its labelling, 12 U.S.C. § 136j(a)(2)(G)—was clearly proscribed by FIFRA at the time of the treatment operation. Petitioners argue that it was not clearly established at that time that such a clear cut violation of the law could be remedied in an action brought under Section 1983.

The issue under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), however, is not whether it was clearly established that Plaintiffs could enforce the law against petitioners, but whether "the law was clearly established . . . since a reasonably competent public official should know the law governing his conduct." *Id.* at 818-19. Moreover, this Court made it clear in *Davis v. Scherer*, ___ U.S. ___, 104 S.Ct. 3012 (1984), that the issue for qualified immunity purposes is whether a clearly established federal statute or right that is the basis for the claim of damages was violated. *Id.* at 3020 n.12. The Court, speaking relatively soon after the landmark case of *Maine v. Thiboutot*, 448 U.S. 1 (1980), did not state that *Harlow* required it be clearly established that the statute or right was enforceable through Section 1983.[3]

---

[3] Indeed, in *Maine v. Thiboutot* itself, the plaintiffs obtained the payment of retroactive benefits and the Supreme Court discussed the availability of *damages* actions for violations of federal statutory rights without any mention that it would be improper to issue a judgment for damages against state officials for conduct occurring before it was clearly established that Section 1983 provided a means to remedy federal statutory violations. *See* 448 U.S. at 4-6.

2. Petitioners Failed to Raise in the District Court Their Arguments for Qualified Immunity to the Constitutional Claims

Petitioners' characterization of the appealable legal issues arising out of their assertion of qualified immunity is twisted in an attempt to fabricate a "legal" issue. Significantly, *none* of the arguments they now make for qualified immunity to Plaintiffs' constitutional claims were presented to the District Court.[4] Petitioner's failure to raise these arguments below not only demonstrates the insubstantiality to their claims, it also undercuts any claim that the Court of Appeals' decision was "clearly erroneous."

3. The District Court's Denial of Summary Judgment on the Procedural Due Process Claims Was Based on Disputed Material Facts—the Applicable Law Was Clearly Established

Petitioners' statement of the issue of law arising from their qualified immunity defense to Plaintiffs' procedural due process claims is "whether it was clearly established at the time of the conduct that the post-deprivation remedies available to Petition-

---

[4] Petitioners made no argument at all that Fourth Amendment standards were not clearly established in the papers submitted to the District Court on the Motion for Summary Judgment. Their discussion of the substantive and procedural due process claims demonstrated that they did not argue the law was not clearly established, only that the facts did not support a finding of such a violation:

> The *only* manner in which the decisions to issue and maintain a hold order and the decision to treat could be considered as violative of plaintiffs' "clearly established constitutional rights" is if such decisions were arbitrary and unreasonable, and were made without providing plaintiffs an opportunity for " . . . some kind of hearing . . . at some time before state *finally* deprives a person of his property interest." (*Parratt v. Taylor,* 451 U.S. 527, 540 (1981).) In this regard the undisputed facts in this case and the applicable law establish the contrary.
>
> State Defendants' Reply Memorandum of Law in Support of Motion For Partial Summary Judgment, filed on or about November 8, 1982, at 80-81.

ers (sic) were inadequate." Petition ¶ 27. This argument is based on Petitioners' misreading of *Parratt v. Taylor,* 451 U.S. 527 (1981). Petitioners' statement of the issues simply ignores the precedent factual question of whether it was *impractical* to provide a predeprivation hearing, which was the basis of the trial court's decision. *See id.* at 539-41; Petition Appendix A—8-9.

Moreover, Petitioners' claim of qualified immunity depends on additional factual issues concerning whether Petitioners acted in conformity with established state procedure, making *Parratt* inapplicable. Contrary to Petitioners' footnoted and illogical argument, Petition at 11 n.4, it is clear that violation of procedural due process which result from established state practice can give rise to liability. *See, e.g., Haygood v. Younger,* 769 F.2d 1350, 1358 (9th Cir. 1985) (en banc), *cert. pet. pending sub nom. Crake v. Haygood,* 54 U.S.L.W. 3393 (Dec. 10, 1985). There also remains a factual issue as to whether any or all of the Petitioners were such "highly placed responsible supervisory officials" that their acts by definition are not "random and unauthorized" under *Parratt. See Berlanti v. Bodman,* 780 F.2d 296, 300-301 (3d Cir. 1985).

Even if Petitioners' characterization of applicable Supreme Court authority were correct, their presentation of the issue again relies on a distortion of the standards under *Harlow v. Fitzgerald,* which cannot be read to require that in order to defeat a claim of qualified immunity Plaintiffs demonstrate that it was clearly established at the time of the conduct in question that postdeprivation remedies available to those particular Plaintiffs be inadequate.

4. Petitioners Attempt to Fabricate a "Legal Issue" on the Substantive Due Process Claims—They do Not Argue that the District Court Did Not Apply Clearly Established Law

Petitioners' statement of the issue arising from the substantive due process claims demonstrates that the disputed issue—whether Petitioners' conduct was arbitrary and outrageous—is one of fact. Petitioners do not dispute that the standard

applied by the District Court, requiring arbitrary, unreasonable and outrageous conduct, was appropriate and clearly established.[5]

Petitioners argue that the issue of law is whether admittedly outrageous and shocking conduct by government officials which violates substantive due process is entitled to qualified immunity if the law was not clearly established at the time that the particular conduct in question could ever give rise to a substantive due process claim. In other words, Petitioners argue that outrageous and shocking conduct by government officials is always immune unless as a matter of law somehow it be clearly established at the time of the conduct that such particular conduct violates substantive due process standards. While this may be a "legal" issue, it is not the kind of legal issue arising from qualified immunity claims that is appealable under *Harlow v. Fitzgerald, supra.*

5. Petitioners Mischaracterize the Appealable Legal Issue on Fourth Amendment claims

Finally, Petitioners argue that the appealable legal issue on the Fourth Amendment claims is whether it was clearly established that an unreasonably imposed quarantine of Plaintiffs' cattle, imposed without a hearing and without probable cause, could

---

[5] Petitioners once again misrepresent the record where they state that "the District Court held that no substantive due process violation occurred from the conduct of the treatment" because a violation was not sufficiently shown. *See* Petition ¶ 28. In fact, the District Court's holding that Petitioners' conduct of the treatment operation did not violate substantive due process resulted from the unsettled state of the law in the Ninth Circuit at that time concerning whether *Parratt v. Taylor* applied to substantive due process claims. Petition Appendix A-11-12. Since that time, the Ninth Circuit has held that *Parratt v. Taylor* does not apply to claims of violations of substantive due process. *Rutherford v. City of Berkeley,* 780 F.2d 1444, 1447-48 (9th Cir. 1986); *Mann v. City of Tucson,* 782 F.2d 790, 793 (9th Cir. 1986). Although this issue will not arise before this Court as a result of this Petition, it is important to note that the District Court applied the proper constitutional standard to determine whether Plaintiffs' substantive due process rights were violated, and determined there was a factual issue as to whether such a violation occurred.

violate clearly established proscriptions of the Fourth and Fourteenth Amendments.[6] In other words, they argue that it was not clearly established that the Fourth Amendment applied at all to the unreasonable seizure of Plaintiffs' cattle. Once again, Petitioners do not challenge the District Court's holding of what the applicable Fourth Amendment standard is, nor do they argue that that standard was not clearly established at the time of their conduct.

In sum, Petitioners are unable to state any legal issues that would form a proper foundation for an appeal. The issues they raise are dependent on precedent factual issues, and/or are dependent upon a misreading of the applicable law, and/or are arguments not presented to the District Court at all and are mere constructs designed to further delay the inevitable trial in this action. The Court of Appeals correctly determined that the issues Petitioners wish to raise are not appealable under *Harlow v. Fitzgerald* and *Mitchell v. Forsyth*.

D. Issuance of a Writ of Mandamus Is Not Justified, and There Is No Reason for the Supreme Court to Assume Jurisdiction

This is not a case deserving of the attention of the Supreme Court. There are no important issues raised in this Petition. Nor is there any oft-repeated error. This case presents unusual facts. The appeal is from a denial of summary judgment made two years before the Notice of Appeal was filed. Because of this, the Court of Appeals had to treat the Notice of Appeal as a motion for reinstatement of that appeal. The Court of Appeals' discretion in treatment of such a motion has been ignored by Petitioners. Petitioners cannot demonstrate that the order dismissing the

---

[6] Petitioners argued this point differently before the Court of Appeals, where they characterized the legal issue as whether their conduct "was so lacking in probable cause as to constitute a violation of clearly established rights to be free from unreasonable seizures." Petition for Rehearing at 4:23-25. This statement indicates they challenge the factual underpinings of the District Court's ruling on the substantive issue, not the Court's decision on qualified immunity.

appeal was clearly erroneous as a matter of law in these circumstances.

For like reasons, this is not an appropriate case for the issuance of a Writ of Mandamus. As discussed above, the right to issuance of the Writ is not clear and indisputable. There is no damage or prejudice to be suffered from denying the application. The District Court's Order is neither clearly erroneous, nor an oft-repeated error, nor does it raise new and important problems. Further, the Petition misrepresents the issues before the Court, misrepresents the issues presented to the Court of Appeals, and misrepresents the basis of the Court of Appeals' decision.

CONCLUSION

The Petition should be denied. This is not an appropriate case for the issuance of a Writ of Mandate because no detriment will be suffered by Defendants if the Writ is denied, because the ruling below is not clearly erroneous, because there is no oft-repeated error involved in this case, because this case does not involve any important issue, because the Petitión has not accurately, clearly or fairly presented the facts and issues relevant to the decision of the Court of Appeals, and because even if this Court were to consider the merits of the Court of Appeals' decision it would find that decision both correct and just.

Ultimately, no matter whether this Court grants the Petition and the Petitioners' position ultimately be sustained, the essential consequence of all of Petitioners' maneuvering has been to delay the inevitable: a trial on the merits concerning Petitioners' outrageous and damaging conduct. It is now seven years since the Complaint was filed. Petitioners have made no showing of the appropriateness of using the extraordinary remedy of requesting a Writ of Mandamus from the Unted States Supreme Court to further their purpose of delay.

DATED: August 29, 1986

Respectfully submitted,

KEKER & BROCKETT
KONG, YUN & SAKUMA

BY: JOHN W. KEKER

BY: DAVID J. MEADOWS
Attorneys for Real Parties in Interest George and Hendrika Neary, individually, and George Neary as representative for Neary & Neary Partnership and Neary & Neary Partnership aka Neary Enterprises and Neary Ranches, a Partnership